

.* IN THE HIGH COURT OF DELHI AT NEW DELHI

% Judgment delivered on: February 8, 2013

+ O.M.P. 474/2012

PRIKNIT RETAILS LTD. Petitioner
Through Ms.Arundhati Katju, Adv.

versus

ANEJA AGENCIES Respondent
Through Mr.R.G. Srivastava, Adv. with
Mr.D.K. Goswami, Adv.

CORAM:

HON'BLE MR. JUSTICE MANMOHAN SINGH

MANMOHAN SINGH, J.

1. Petitioner M/s. Prinknit Retails Ltd., who is a manufacturer of readymade garments, filed the petition under Section 14(2) of the Arbitration and Conciliation Act, 1996 seeking quashing of order dated 24th March, 2012, declaration of termination of the mandate of the Delhi Hindustani Mercantile Association to act as arbitrators.

2. In short, the case of the petitioner is that the petitioner company received a notice 10th May, 2011 from Delhi Hindustani Mercantile Association (in short DHMA) stating that the respondent firm had some claims against the petitioner company. In the claim, the respondent sought payment of a ₹1,92,41,398/- from the petitioner company which includes ₹1,18,84,438/- as outstanding for goods allegedly purchased from the respondent, ₹73,45,960/- as interest @18% upto 21.12.2010 and ₹11,000/- as notice charges. In the claim, the respondent firm sought to rely upon the

purported arbitration clause that was printed upon its bills. The specimen of the clause as appeared on bill No.2463 reads as under:

“In case of any dispute between you and us regarding payment etc. or any other business matter we both shall approach the Delhi Hindustani mercantile Association or the arbitrator or tribunal appointed by them for settlement by arbitration according to their rules and the decision given by them shall be binding on both of us and we shall have no objection to it.”

3. The respondent has alleged that it issued legal notice dated 30th December, 2010 to the petitioner company calling upon it to pay ₹1,18,84,438/- with interest failing which the respondent would refer the dispute for arbitration to DHMA.

4. The petitioner company entered appearance before the Arbitral Tribunal of DHMA and filed an application under Section 12/14/16 of the Arbitration and Conciliation Act, 1996. The petitioner company raised objections under Section 7 of the Arbitration and Conciliation Act, 1996 and informed that it was the admitted case of the respondent firm that it had not signed any of the bills issued to the petitioner company and therefore, it was contended that neither party had any intention to enter into an arbitration agreement. It was also contended by the petitioner in the said application that even in the terms of alleged arbitration clause, the DHMA could assume jurisdiction only when approached by both the parties to the dispute. The judgment of this Court in the case of Anita Mittal v. Pal Singh Kartar Singh & Anr., reported as 164 (2009) DLT 418, being FAO No.298/2007, was referred.

5. The respondent filed the reply to the said application. Thereafter,

DHMA passed the order dated 24th March, 2012 dismissing the application moved by the petitioner on the ground of Anita Mittal (supra) has nothing to do with the contents of the present case because of the reason that no notice was given to the non-claimant in that case.

6. Aggrieved by the said order dated 24th March, 2012, the petitioner by invoking the power of this Court under Section 14(2) of the Arbitration and Conciliation Act, 1996 filed the present petition on various grounds. The contention of the petitioner is that the Tribunal failed to appreciate the judgment of the Anita Mittal (supra) has the effect of de jure terminating the mandate of the Tribunal in cases like the present where DHMA has been approached by only one party to the dispute. The learned Tribunal was wrong by distinguishing Anita Mittal (supra) on the ground that no notice of the arbitration proceedings had been served upon the non-claimant therein. Therefore, the findings of Anita Mittal (supra) are not applicable to the facts of the present case.

7. At the outset, It is noteworthy to observe that learned counsel for the petitioner has already stated and it was recorded in the order dated 18th May, 2008 that she is not pressing her objection qua the jurisdiction of the arbitral tribunal to hear the matter and her objection would be confined to termination of the mandate of the arbitrator under Section 14(1) of the Act that the Tribunal has been rendered de-jure unable to perform its functions for which an application can be made to the Court under Section 14(2) of the Act.

8. Learned counsel Ms. Katju, appearing on behalf of the petitioner has made her submissions in relation to her objection under Section 14 (1) of the Act which can be outlined in the following manner:

- a) Firstly, it has been argued by the learned counsel that in the instant case arbitration has been sought to be invoked by the clause which has been incorporated in the invoice issued by the respondent to the petitioner. It has been argued that there is no consensus ad idem at the time of the appointment of the arbitrator and thus the appointment could not have been made unilaterally which renders the arbitration illegal and as such the mandate of the arbitrator is terminated. In support of her contention, learned counsel relied upon the judgment passed by in case of Anita Mittal (supra).
- b) Secondly, it has been argued by the learned counsel for the petitioner that the arbitration clause which has been alleged invoked in the instant case appoints DHMA as an association as a arbitrator, to which the petitioner has never acceded to as an arbitrator. It has been argued that this court in the case of Anita Mittal (supra) has considered the similarly worded clause in an arbitration matter decided as under in paras 8 & 9 of the order:-

“8. As per this clause, in case of any dispute between the parties, both of them had to approach the Delhi Hindustani Mercantile Association, Delhi or arbitrator or tribunal appointed by them for settlement by arbitration.

9. Admittedly, in the present case, appellants never approached Delhi Hindustani Mercantile Association or Arbitrator. It is Respondent no.1 who alone had approached Delhi Hindustani Mercantile Association for appointment of the Arbitrator. Thus, there is a clear violation of above clause of the Arbitration.”

Accordingly, as per the learned counsel for the petitioner, once the judgment passed by this court wherein it was held that the arbitration cannot be done unilaterally after considering the similarly worded clause, as appeared on Bill No.2463 as an association has de-jure become incapable of performing its function. It has been thus stated that this court should terminate the mandate of the arbitrator on account of such de jure disability arising out of the law by way interpretation of the clause done by this court in the case of Anita Mittal (supra).

- c) Thirdly, it has been argued by the learned counsel that the learned arbitral tribunal has wrongfully distinguished the judgment passed by this court. It has been argued that the said judgment of Anita Mittal (supra) was binding on the arbitral tribunal and thus the arbitral tribunal had no reason to deviate from the view taken by this court in the said case and this court should adopt the same view as taken in the said case as no useful purpose would be served with the continuance of the arbitration. As far as interpretation of said clause is concerned, there is now no res-integra as the Tribunal being a Party to Anita Mittal's case (supra) was bound by the judgment.

By making the afore noted submissions, learned counsel for the petitioner prayed that this court should allow the petition and pass the orders in terms of the prayers made in the application.

9. Per contra, learned counsel Mr. Shrivastava, appearing on behalf of the respondent has made his submissions which can be enumerated as under:

- a) Learned counsel firstly argued that the arbitrator can be appointed as per the arbitration clause contained in the invoice and the said appointment cannot be faulted with. It has been informed that the petitioner has been dealing with the respondent for a considerable period of time. Even after the notice dated 30th December, 2010 has been served, there has been no reply from the petitioner's end challenging the appointment. The respondent participated in the proceedings and challenged the jurisdiction of the arbitrator which has been rejected. In the light of the same, now the petitioner is precluded from challenging the mandate of the arbitrator when there exists no ground for the same. The only recourse available to the petitioner to challenge the award as such under Section 34 and challenge the same on the grounds which the petitioner is urging before this court at this premature stage.
- b) Learned counsel for the respondent has further argued that no ground for the termination of the mandate of the arbitrator under Section 14 is made out at this stage. It has been argued that the arbitrator has not become incapable of performing his duties either defacto or dejure. It is submitted that the petitioner has filed the frivolous application by misconstruing the provisions of Section 14, when there is no ground which has been made out warranting this court to intervene under Section 14 of the Act.
- c) Learned counsel for the respondent has argued that the arbitrator rightly passed the order dated 24th March, 2012 wherein the judgment passed in the case of Anita Mittal (supra) has been distinguished as the judgment passed by the court is rendered in the facts and

circumstances of the each case. The factual matrix of the instant case is distinct from the facts and circumstances of that case. Therefore, no parallel can be drawn from the said judgment as in the said case, there was no notice which was issued to the respondent before appointment of the arbitrator.

10. Learned counsel for the respondent in this context relied upon the judgment of Apex Court in the case of ***Narmada Bachao Andolan Vs. State Of M.P. & Anr, (2011) 7 SCC 639*** wherein the Supreme Court has held that the judgment passed by the courts are to be read in the lights of facts and circumstances and the same cannot be applied mechanically without having a look at the difference in the facts of each case. The Supreme Court in ***Narmada Bachao*** (supra) held as under :

“The Court should not place reliance upon a judgment without discussing how the factual situation fits in with a fact-situation of the decision on which reliance is placed, as it has to be ascertained by analysing all the material facts and the issues involved in the case and argued on both sides. A judgment may not be followed in a given case if it has some distinguishing features. A little difference in facts or additional facts may make a lot of difference to the precedential value of a decision. A judgment of the Court is not to be read as a statute, as it is to be remembered that judicial utterances have been made in setting of the facts of a particular case. One additional or different fact may make a world of difference between the conclusions in two cases. Disposal of cases by blindly placing reliance upon a decision is not proper. (Vide: Municipal Corporation of Delhi v. Gurnam Kaur, AIR 1989 SC 38; Govt. of Karnataka & Ors. v. Gowramma & Ors., AIR 2008 SC 863; and State of Haryana & Anr. v. Dharam Singh & Ors. (2009) 4 SCC 340) 54”

11. By making the aforementioned submissions, it has been urged that

this court should dismiss the petition under Section 14 of the Arbitration and Conciliation Act as no case is made out for the interference of this court.

12. I have gone through the petition filed by the petitioner, documents appended thereto, reply as well as the documents filed therewith. I have also given my thoughtful consideration to the submissions advanced by the learned counsel for the parties across the bar. I shall first proceed to discuss the legal position in the light of the scope of the proceedings under Section 14 of the Act and thereafter evaluate the submissions of the learned counsel for the parties.

13. It is necessary to highlight that the present petition has been filed under Section 14 of the Act stating that in view of the judgment passed by this court in the case of *Anita Mittal* (supra), the court should proceed to hold that the mandate of Delhi Hindustani Mercantile Association stands terminated as a matter of law as the association is incapable of performing its function. For evaluation of the said ground, it is necessary to first consider the scope of the proceedings under Section 14 of the Act.

14. Section 14 of the Arbitration and Conciliation Act reads as under:

(1) The mandate of an arbitrator shall terminate if—

- (a) he becomes *de jure* or *de facto* unable to perform his functions or for other reasons fails to act without undue delay; and
- (b) he withdraws from his office or the parties agree to the termination of his mandate.

(2) If a controversy remains concerning any of the grounds referred to in clause (a) of sub-section (1), a party may, unless otherwise agreed by the parties, apply to the Court to decide on the termination of the mandate.

(3) If, under this section or sub-section (3) of Section 13, an arbitrator withdraws from his office or a party agrees to the termination of the mandate of an arbitrator, it shall not imply acceptance of the validity of any ground referred to in this Section or sub-section (3) of Section 12.

15. From the bare reading of Section 14(1) (a) of the Act, it is manifest that the said provision provides for distinct eventualities under which, the mandate of an arbitrator shall terminate. The said eventualities are:

- a) If he becomes de jure unable to perform his functions or
- b) If he becomes de facto unable to perform his functions or
- c) For other reasons fails to act without undue delay.

16. From reading of sub clause (a), it can be seen that the eventualities prescribed therein are disjunctive in nature as the said provision uses the expression “or” in between kinds of the eventualities. This would mean that the mandate of the arbitrator would be terminate by occurrence of any of the events prescribed in sub clause (a) which is either becoming de jure or de facto unable to perform function or for other reasons fails to act without delay.

17. It is equally noteworthy to mention that the events prescribed under Section 14 (1) (a) of the Act relates to incapacities which may arise as a disqualification on the arbitrator either by operation of law or as a matter of fact or otherwise which may make him unable to perform his functions. The said incapacities which may arise either by operation of law or fact should be such that by virtue of the very nature of the said incapacities having been arisen, the arbitrator should be unable to perform his functions. The said incapacities should thus have a direct nexus with the inability to perform his functions. Further, the nature of incapacity or disability should occur to the

arbitrator himself so that he becomes as a matter of law or fact unable to perform functions without any further enquiry.

18. The defacto or dejure inability as contemplated by Section 14 (1) (a) should be such which affects the inherent ability of the arbitrator to function and cannot be such which may require any inference to be drawn by the court either in law or in fact or any fact finding enquiry is required so as to arrive at the finding that the arbitrator is precluded from performing his function. That is the reason why, the legal disability or incapacity or de jure functions have been interpreted by the courts are legal disqualification which precludes a person to hold such office or to function as an arbitrator. The said legal disqualification are also relates to his ability to function, therefore the same are also held by the courts as personal in nature.

19. Likewise, the de facto inability to function should be such which by the very occurrence of the fact itself implies that the arbitrator cannot function without any further enquiry. The example of the same would be death of the arbitrator or health problem of the arbitrator etc.

20. This court has aptly explained the meaning of dejure and de facto disability in the case of **Shyam Telecom Ltd. vs Arm Ltd, 2004 (3) ARBLR 146 Delhi**. The court observed thus:

The mandate of an Arbitrator automatically terminates at the death of the Arbitrator or his physical incapacity to proceed with the mandate. This provision sets following three grounds that constitutes an Arbitrator's inability ; (i) his de jure, or (ii) his de facto inability to perform his functions, or (iii) his failure to act without undue delay for other reasons. **The first situation refers to an Arbitrator's legal incapacity to perform his functions under the law and relates to circumstances under which the Arbitrator by law is barred from continuing in office, for instance, incapacity, bankruptcy conviction for a criminal offence, etc. The second incapacity**

relates to factual inability, which includes factual situation, in which the Arbitrator is physically unable to perform his functions for instance, such as continuous ill-health, etc. The last situation "failure to act without undue delay" is an expiry provision according to which the mandate of the Arbitrator shall terminate if for other reasons he fails to act without undue delay. **(Emphasis Supplied)**

13. The de jure impossibility referred to in Clause (a) of Sub-Section (1) of Section 14 is the impossibility which occurs due to factor personal to Arbitrator and de facto occurs due to factors beyond the control of the Arbitrator. The judicial intervention of the Court is provided in Sub-section (2) only if a controversy remains concerning any of the grounds referred to in Clause (a) of Sub-section (1) of Section 14 of the Act. Sub-section (2) of Section 14 empowers the Court to decide the question of termination of the mandate if a controversy arises concerning the termination of the Arbitrator's mandate on one or the other grounds. **(Emphasis Supplied)**

21. From the reading of the aforesaid observations of this court in Shyam telecom (supra), it is clear that the dejure inability as explained by the court in the case relates to factors which may be termed as personal legal disability which arise by operation of law leading to his inability to function but not any other event which legally does not prohibit him directly to function as an arbitrator.

22. In no circumstances, the events either in fact or in law which affect the rights of the parties on merits of the case or the events affecting the arbitrability of the dispute in question can be termed as legal disqualifications of the arbitrator which preclude him to function as an arbitrator. The questions affecting whether the dispute is arbitrable or not or whether the arbitration is possible or not or whether the legally it is permissible to appoint the arbitrator or not may be good grounds on merits

to interfere with the award but the same cannot be called as legal disqualifications on the arbitrator leading to an inability to function. If the said questions are allowed to be imported and considered within the purview of Section 14 of the Act, the same would amount to unnecessarily widening the scope of the interference in the cases of termination of mandate of the arbitrator and doing injustice with the express wordings of the Section 14 of the Act. The said widening of the scope shall also be in contravention to the underlying policy behind the Arbitration and Conciliation Act 1996 which is to minimize the role of the court in intervening in arbitration matters which is clear from the plain reading of Section 5 of the Act.

23. Therefore, not mere legal disability is a condition precedent for invocation of Section 14 but the said disability must relate to the ability to function. It is one thing to say that the arbitrator could not have appointed at the first place and his appointment is bad due to lack of consent by the party but it is altogether different thing to say that the arbitrator possesses legal disqualifications leading to inability to perform his function. The distinction is blurred but not such which can be said to be unidentifiable.

24. After realizing the proposition that the questions relating to arbitrability or related aspects cannot be termed as de jure disabilities of the arbitrator, if one now considers the contention of the learned counsel for the petitioner which is that the judgment passed in the case of *Anita Mittal* (supra) can be said to be terminating the mandate of DHMA to act as an arbitrator, the answer to the said submission is pretty simple which comes in negative. The reasons for the said answer in negative are manifold and the same are discussed as follows:

- a) The judgment passed in the case of *Anita Mittal* (supra) only decides the two aspects which are first that the arbitrator could not be appointed unilaterally as one of the party only approached the arbitrator and second that there is no consensus ad idem and thus there is no existence of arbitration agreement. The said judgment nowhere expressly holds that there exists any legal disqualification or bar on the Delhi Hindustani Mercantile Association to function as an arbitrator. Therefore, it would be totally unwise to infer anything out of the judgment which is not emerging from the plain reading of the judgment.

It is well settled principle of judicial precedent that the judgment is a precedent on the proposition which is directly emerging therefrom and not for the one which can be logically deduced therefrom as a matter of consequence. Kindly see the judgment passed in the case of *Davinder Singh and Others Vs. State of Punjab & Others*, (2010) SCC 88 and *P.S. Sathappan (Dead) By LRs Vs. Andhra Bank Ltd. & Ors* decided on 7 October, 2004 by Supreme Court.

As was said by Lord Chancellor HALSBURY in *Quinn v. Leathern, H.L. (I.) 1901, 495*,

“..... there are two observations of a general character which I wish to make, and one is to repeat what I have very often said before, that every judgment must be read as applicable to the particular facts proved, or assumed to be proved, since the generality of the expressions which may be found there are not intended to be expositions of the whole law, but governed and qualified by the

particular facts of the case in which such expressions are to be found. **The other is that a case is only an authority for what it actually decides. I entirely deny that it can be quoted for a proposition that may seem to follow logically from it. Such a mode of reasoning assumes that the law is necessarily a logical code, whereas every lawyer must acknowledge that the law is not always logical at all.**” (Emphasis Supplied)

Applying the said principle of law to the instant case, it can be said easily that once the judgment of *Anita Mittal* (supra) does not put any legal impediment upon the Delhi Hindustani Mercantile Association to function as an arbitrator and only arrives at the finding that the award is illegal in that case in the absence of arbitration agreement, which is confined to the facts of the said case. There is no reason why that the court should draw any inference or presumption out of the said judgment when the judgment is not an authority on the said proposition. Therefore, question of the arbitrator becoming De jure incapable does not arise.

- b) The said judgment of *Anita Mittal* (supra) only holds that the arbitrator in the said case could not be appointed at the first place due to lack of arbitration agreement. However, that by itself also does not mean that in law, it is legally impossible for DHMA to act as an arbitrator in relation to similarly worded arbitration clauses. There are judgments passed by this court in the case of *J.N. Textiles vs. Bon Chance &Anr*, 87 (2000) DLT 563, *Tikkanlal Sewaram vs. Jiwan Das Desraj*, 1980 RLR 681 and *P.C. Aggarwal vs. K.N. Khosla*, AIR 1975 Del 64 wherein similar question arose as to whether DHMA can act as arbitrator on the basis of the clause mentioned on the bill or

invoice. The Learned Single judges of this court including Division Bench in **P.C. Aggarwal** (supra) are of the consistent view by giving the answer in affirmative by stating that DHMA can act as an arbitrator in similar circumstances. Therefore, the argument that the judgment passed in the case of **Anita Mittal** (supra) as a matter of consequence terminates the mandate of DHMA to act as arbitrator as a de jure incapable is incorrect as it is quite possible in the given facts that the said association may continue to function as an arbitrator. Therefore, it is total wrong understanding of the petitioners to urge this ground.

- c) The submission of the petitioner that the unilateral appointment entails illegality in the award and putting the reliance on the judgment of **Anita Mittal** (supra) stating that it also holds so in the context of unilateral appointment and hence the arbitrator has become de jure incapable is equally non meritorious argument. The unilateral appointment is a subject which vitiates the appointment or entails illegality in the award which may be challenged at the appropriate stage as seen in the several cases decided by the courts. However, the said aspect of appointment as well as illegality resulting from the lack of consent has no relation with the disability arising in the arbitrator as a matter of law. Therefore, it is premature to consider these arguments at this stage under Section 14 as this court is bound by the express wordings of the Act which prescribes the scheme for interference at the successive stages of arbitration.
- d) The judgment passed in the case of **Anita Mittal's** case (supra) cannot be applied to this case as the same was passed by this court while

hearing an appeal against the order under Section 37 against the rejection of the objection by the court below. At such stage, the questions relating to arbitrability, appointment etc are all open to challenge which can be seen from the clear wordings of Section 34 as well as Section 37. Even the objection under Section 16 relating to existence of jurisdiction on the arbitral tribunal can be challenged only under Section 34 of the Act. The Act prescribes a composite scheme with limited interference of the court on the different occasions arising during the course of arbitration proceedings. The domain of the court under Section 14 is narrower than that of the court hearing an objection under Section 34 of the Act. Therefore, the grounds like lack of consent, inappropriate appointments do not fall within the permissible extent of Section 14 of the Act enabling this court to interfere in the matter. That is why no aid can be drawn from *Anita Mittal's* case (supra) vis-a-vis this case when the grounds of challenge are different and cannot be even be considered to terminate the mandate of the arbitral tribunal.

In view of the aforementioned reasons, it is clear that the judgment passed in the case of *Anita Mittal's* case (supra) cannot be applied by this court particularly at this stage to terminate the mandate of the arbitrator. Therefore the premise of the entire petition of the petitioner is misconceived.

25. Now I turn to submissions advanced by the learned counsel for the petitioner that the learned arbitral tribunal has distinguished the judgment of this court in *Anita Mittal's* case (supra) on trivial grounds. I do not find force in the argument of the learned counsel for the petitioner. I have already

given several reasons as to why the judgment of *Anita Mittal* (supra) cannot be said to be taking away the right of the arbitral tribunal to function as such. The mere fact that the reasons of the arbitrator distinguishing the same are not too exhaustive or happily worded do not mean that in fact the said judgment is not distinguishable. Till the time, there is no legal bar which is emerging from the judgment of *Anita Mittal* (supra) for DHMA to act as an arbitrator, there is no reason why the said judgment should come in the way of the association to act as an arbitrator in the matter.

26. Additionally, I also find that the prayers made in the petition filed by the petitioner cannot otherwise be allowed considering the scope of the provisions of Section 14 of the Act. This is due to the reason that the only remedy which is available consequent upon the termination of the mandate of the arbitrator is to appoint the substitute arbitrator under section 15 of the Act. The legislative intent behind termination of the mandate of the arbitrator is that the arbitrator has incapable performing his work or the mandate or the work assigned to arbitrator cannot otherwise be completed without delay due to the stipulations contained in the contract. All this would mean that if the mandate for any reason is incapable of being performed by the arbitrator, then substitute arbitrator has to be appointed to fulfil that mandate. But in no circumstances, the process of termination of mandate can be used to shut down the arbitration proceedings itself unless the parties agree otherwise in the agreement. The same is evident from the conjoint reading of Section 14 and 15 of the Act which prescribes the eventualities under which the mandate terminates and consequences thereof by appointment of substitute arbitrator. On the other hand, the petitioner's stand in the instant case is that the arbitration in the instant case is not

possible in view of the alleged legal disability (which is non-existent in view of the present discussion) seeking prayers from this court to set aside the order of the learned Arbitrator dated 24th March, 2012 ruling on similar application made before him, second declaring that DHMA cannot act as arbitrator and quash the arbitrator proceedings. None of the prayers contained in the petition falls within the four corners of Section 14 of the Act as neither this court is hearing an appeal against the order of the learned arbitrator challenging him under Section 13 or Section 16, the remedy of which is objection as per Section 34 nor this court can declare the association as legally disabled in view of no legal bar and proceed to merely quash the proceeding without appointing substitute arbitrator. Such kind of declaration and quashing the order at the behest of the petitioner who does not seek for appointment of substitute arbitrator and rather do not want arbitration to continue is totally contrary to the scheme of Section 14 of the Act of 1996. Therefore, the said prayers as such contained in the petition cannot be allowed.

27. Accordingly, the said petition is dismissed.

28. No costs.

(MANMOHAN SINGH)
JUDGE

FEBRUARY 8, 2013/jk